

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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MilitaryHomeLink.com, : 18-CV-00011(WES)
LLC, :
Plaintiff, :
:
:
-against- : United States Courthouse
: Providence, Rhode Island
:
:
Hunt Companies, Inc., et : Monday, July 23, 2018
al, : 10:00 a.m.
Defendants. :

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TRANSCRIPT OF CIVIL CAUSE FOR A MOTION TO DISMISS
BEFORE THE HONORABLE WILLIAM E. SMITH
UNITED STATES CHIEF DISTRICT COURT JUDGE

A P P E A R A N C E S:

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1 (In open court)

2 THE COURT: Good morning. This is the matter of
3 MilitaryHomeLink.com, LLC versus Hunt Companies, Inc.,
4 et al. We're here on defendants' motion to dismiss.

5 Let's have counsel identify themselves for the
6 record, please.

7 MR. RENNER: Good morning, your Honor. Eric
8 Renner for the plaintiff.

9 MR. PRYWES: Daniel Prywes for defendants.

10 MS. RODRIGUEZ: Jessica Rodriguez for
11 defendants.

12 MS. DUNN: Mary Dunn, local counsel for
13 defendants.

14 THE COURT: Okay. Thank you very much. All
15 right. This is defendants' motion so I'll hear from
16 the defendant first.

17 MR. PRYWES: Good morning, your Honor.

18 THE COURT: Morning.

19 MR. PRYWES: Your Honor, we're here today on the
20 motion of defendants' Hunt Military Communities and its
21 second level parent Hunt Companies to dismiss the
22 nine-count complaint brought by plaintiff, Military
23 Home Link. The lawsuit arises out of a breakup of a
24 working relationship that began in 2008, and it's a
25 breakup like many where one party didn't want to let go

1 and that's the plaintiff.

2 We're now on the fourth -- third amended
3 complaint so it's the fourth complaint that's been
4 filed in this case. And our position is that there's
5 still no viable cause of action that's been presented.
6 There are two primary claims that are presented in this
7 case. One is a breach-of-contract claim. And that
8 claim is that Hunt -- I'll use Hunt generically to
9 refer to the two defendants -- Hunt breached an oral
10 contract allegedly entered in 2008 when Hunt stopped
11 doing business with plaintiff in 2017. And as I'll get
12 into, the complaint is internally inconsistent about
13 exactly what that contract allegedly was.

14 The second principal claim is a fraud claim.
15 And that claim is that Hunt fraudulently represented in
16 late 2016, early 2017, that it would enter into a
17 contract to continue the prior arrangement. That's
18 complaint paragraph 80. But as I'll get into a little
19 bit later, it was quite clear to everyone that no
20 written contract had been entered.

21 The two main problems with the complaint that
22 sort of pervade the whole complaint are
23 self-contradiction, on the one hand, and on the other
24 hand, it's trying to take some preliminary negotiations
25 that were all subject to the execution of a written

1 contract and to turn them into some kind of binding
2 promise.

3 THE COURT: I'm going to interject here. I've
4 read the materials so I have some sense of what your
5 arguments are. And I'm not sure your framing of the
6 complaint is accurate or correctly describes what it is
7 that the plaintiff is attempting to do in the
8 complaint. Because as I read a lot of your materials,
9 you seem to rely upon the proposed contract that
10 plaintiff forwarded to and kept encouraging the
11 defendant to either enter or engage in or negotiate or
12 whatever as sort of the terms, if you will.

13 I don't read the complaint that way. What I
14 think the plaintiff is saying is that there was this
15 oral contract where plaintiff provided work and
16 services, and it may be a question whether it's a
17 service contract or goods -- we can talk about
18 that -- and then there was an effort to get a written
19 agreement with the defendant which may have had other
20 terms in it. But I don't see the latter as sort of
21 defining the scope of the former. I don't see the
22 proposal as defining what the actual relationship was.

23 So what I want to start with, though, is
24 something that I really don't fully understand and I'm
25 going to ask Mr. Renner this too. You described it as

1 a working relationship. They say it's a contract.
2 Describe for me exactly what it is that the plaintiff
3 did for the defendant. I don't fully get it.

4 MR. PRYWES: Okay. Hunt runs military housing.
5 When someone in the military gets a permanent change of
6 station, they're assigned to, let's say, Rhode Island,
7 a base in Rhode Island, they need to apply for housing.
8 And in order to make that easy for a resident, the
9 plaintiff set up a website and on that website you
10 could apply for housing.

11 THE COURT: Housing with Hunt?

12 MR. PRYWES: With Hunt.

13 THE COURT: Okay. And they work exclusively
14 during this period for Hunt.

15 MR. PRYWES: No. They were free to work with
16 others. And historically they worked with other
17 companies. And my understanding is that their other
18 military housing providers were abandoning them and so
19 Hunt was, you know, one of the last relationships they
20 had.

21 THE COURT: Okay.

22 MR. PRYWES: So that's what was going on.

23 THE COURT: So they provide a platform, a
24 website, and on this website a military person could go
25 on and they could look at different options for

1 housing. And Hunt would be one of those options, and
2 Hunt would list all of its housing options in that
3 location, right?

4 MR. PRYWES: Right. They could fill out the
5 forms to apply, and they could also fill out forms to
6 apply for other things and there were ways of signing
7 up with moving companies. There was a -- and that's
8 where they got the commission income from moving
9 companies and cable TV providers and others who they
10 essentially advertised on their web platform. So there
11 was no money ever going from Hunt to the plaintiff.

12 THE COURT: Right.

13 MR. PRYWES: They got -- they relied -- their
14 business model was to rely on these commissions. But
15 that model was breaking down, it wasn't working
16 anymore, and so what you had at the end of 2016 is
17 Hunt -- I'm sorry, plaintiff did not want to continue
18 that relationship anymore. They wanted to move to
19 something drastically different.

20 And that was the whole subject of all those
21 e-mails and telephone calls at the end of 2016, early
22 2017. They weren't talking about let's continue things
23 the way we always were. If you look at that, they were
24 talking about a plaintiff proposal that would have
25 required Hunt to basically be the guarantor of their

1 profitability. If they weren't making money, they
2 wanted Hunt to guarantee their profitability.

3 THE COURT: But that's all about the proposal
4 that didn't ever come into play.

5 MR. PRYWES: Exactly.

6 THE COURT: So, I mean, I see that as kind of
7 irrelevant to this whole question.

8 MR. PRYWES: Okay.

9 THE COURT: The question here is -- the first
10 question is whether this relationship that plaintiff
11 had with Hunt, was it a contract?

12 MR. PRYWES: Right.

13 THE COURT: And you say it isn't. And I'm
14 trying to understand -- I mean, it's obviously not a
15 written contract. It's a relationship. There's
16 something going on here. Hunt isn't paying the
17 plaintiff to do anything, as I understand it, with
18 respect to this platform. Plaintiff is getting its
19 money, as you said, from other parties who were
20 advertising or getting commissions.

21 So one question would be, what's the
22 consideration? If there's a relationship, what's the
23 consideration?

24 Now, the plaintiff says in the complaint that
25 they are maintaining document centers in this platform,

1 and that there's this whole business about this sort of
2 document center contract. There's a lot of paragraphs
3 of the complaint that describe it, and there's material
4 in the complaint that says, you know, documents are
5 created for Hunt, basically, like you can do your
6 housing application, you can apply for, you know, all
7 these support services and so forth.

8 And I get the sense out of the complaint that
9 the plaintiff maintains these documents or at least
10 provides the process by which an applicant uploads or
11 submits applications. So there's clearly something
12 going on between Hunt and the plaintiff.

13 MR. PRYWES: Right.

14 THE COURT: And the complaint suggests that the
15 defendant made suggestions or directives that things
16 should be modified in a certain way or they should be
17 provided in a certain way. So there's the --

18 MR. PRYWES: Your Honor, I'd like to make two
19 point on that.

20 THE COURT: Yes.

21 MR. PRYWES: First of all, the mere fact that
22 you have a continuing relationship with another party
23 does not create a contract. I've been going to the
24 same dry cleaner for nine years. We don't have a
25 contract. I can take my business elsewhere whenever I

1 want.

2 On a more sophisticated level, my law firm has
3 an accounting firm. We've been using the accounting
4 firm for years. We don't have a contract that binds us
5 to continue doing business with them. There has to be
6 an intent to be bound.

7 Now, the second point I'd like to make is that
8 there has to be some certainty, some definiteness about
9 what the terms of the contract are. And in this
10 complaint that we're dealing with, it's internally
11 contradictory. On the one hand, the complaint is
12 chockful of allegations that the parties agreed are a
13 long-term relationship. In the same complaint, there's
14 an allegation that it was terminable at will subject
15 only to a reasonable notification period.

16 So which is it? You can't have a contract where
17 something as basic as that is up in the air after four
18 complaints.

19 THE COURT: Well, the description can be that it
20 was a long-term relationship and the parties aspire, at
21 least the plaintiff thought they were aspiring, to have
22 an even longer term relationship and that it can be a
23 terminable-at-will relationship. That's not
24 inconsistent.

25 MR. PRYWES: They might have said that, but

1 that's not what they said. They said it could have
2 been terminated after nine days. They said this
3 contract could have been terminated after nine days.

4 THE COURT: But what's inconsistent about that?

5 MR. PRYWES: Well, it could have been terminated
6 nine days after it was supposedly created. So how is
7 that a contractual agreement on a long-term
8 relationship?

9 THE COURT: Well, I get the sense that they're
10 saying not that it was a relationship that had a
11 long-term term to it, but rather that was a description
12 of what they thought the aspiration of the agreement
13 was.

14 If you go to work for me and I say to you, I
15 hope you'll be here for your entire career, and then
16 after a month I decide you're not a good fit and I fire
17 you, I could have had the aspiration to employ you for
18 30 years and still fired you after a month and there's
19 nothing inconsistent with that.

20 MR. PRYWES: That's not what the complaint says.
21 They might have pled that. I mean, they might have
22 pled that, but if you look at the agreement -- the
23 complaint, it says time and again there was an
24 agreement on a long-term relationship, one that will
25 continue for years to come.

1 That's their story. That's the complaint we're
2 dealing with. That's the one that's before the Court.
3 And that's the one that doesn't make any sense when you
4 compare it to all these other statements, that it was
5 terminable at will, that it was -- could have been
6 ended after nine days.

7 In your Honor's example about hoping, your
8 Honor, you put your finger on it. That's not a
9 contract. That's not a contract. If you say I hope
10 you'll be here your whole career, that's not a
11 contract. It doesn't bind you to anything.

12 And there was no -- if we can't even tell what
13 the supposed contract is by looking at this complaint,
14 then it fails for lack of essential terms, not to
15 mention all the other contract terms, all the other
16 things that would go -- one would expect to see in a
17 contract like this.

18 And we know what those things are because the
19 plaintiff submitted contracts and they're chockful of
20 all kinds of terms that are important terms about scope
21 of duties, who does what, all kinds of details. And
22 there's no allegation that any of those things were
23 agreed upon.

24 So I would submit that this alleged contract was
25 too indefinite to qualify as a valid contract. Now,

1 let's suppose --

2 THE COURT: Well, let me just refer you to -- I
3 see an argument for what you're suggesting with the
4 complaint, but I think you can read it a different way.

5 Paragraphs 21 and 22 are exactly what I think
6 you're referring to. 21 talks about the two-stage
7 document centers contract and their historic course of
8 dealing. That the plaintiff continued to develop and
9 maintain the document centers for Hunt and provide the
10 customer/employee support and services. And Hunt
11 continued to provide the daily move-in reports to the
12 plaintiff.

13 And then 22 says, "As during the preceding
14 years, MHL continued to invest significant time and
15 resources developing the Hunt document centers, based
16 on Hunt's promise and the parties' discussions,
17 understanding and agreement of a long-term relationship
18 whereby MHL would continue to obtain lucrative
19 commissions during and through its future involvement
20 in the ongoing maintenance and customer/employee
21 support work."

22 So you're saying, well, that is describing the
23 term of what plaintiff says the contract was and that's
24 inconsistent with an at-will termination. But another
25 way of looking at that paragraph is to say that this is

1 the understanding under which the plaintiff was
2 operating. That it was investing its resources and it
3 was developing its products with this general
4 understanding, which had been encouraged by the
5 defendant in these various discussions back and forth
6 that there was going to be this continuing long-term
7 relationship but recognizing that it was an oral
8 contract and until it was reduced to writing, it was
9 terminable at will.

10 MR. PRYWES: That's not their theory, though.
11 That's not their theory of the case.

12 THE COURT: This paragraph, you could read this
13 paragraph as going more to what the damages are in the
14 context of a relationship.

15 MR. PRYWES: Look at paragraph 18. 18 refers to
16 the parties' discussions, understanding and agreement
17 of a long-term relationship, okay. And that's -- then
18 we can find many other paragraphs.

19 Paragraph 44 alleges that Hunt misled plaintiff
20 into believing the parties' relationship would continue
21 for years to come. Paragraph 64 says -- here it says
22 the plaintiff intended it to be a long-term contract
23 and believed it was a long-term contract based on the
24 parties' discussion, understanding and agreement of a
25 long-term relationship.

1 Your Honor, he's tried four times to plead a
2 viable claim and we get this complaint. And on the one
3 hand, it says it's terminable at will and, on the other
4 hand, it says it's long term. And then he says that it
5 could have been terminated after nine days.

6 So we don't know what this supposed contract
7 was. He hasn't pled that with any clarity. And in
8 order to be a contract, it's a basic contract law,
9 there has to be some definiteness to what the contract
10 requires. And courts will not supply terms -- and this
11 is important -- courts will not supply terms unless it
12 is conclusively shown that the parties intended to
13 agree to a contract. That's from the restatement.
14 That's cited in the plaintiff's own papers.

15 So there's no conclusive showing here, there's
16 nothing to support the claim that this was the way
17 you've construed it. That's not their theory. But
18 let's suppose, let's just suppose, that there is a
19 contract, okay. So then the question is, well, what is
20 the -- what are the termination terms of that contract?

21 Now, the authorities that plaintiff cites on
22 page 16 in his brief, specifically *Williston* say where
23 there is a contract of an indefinite termination,
24 courts can go two ways on that. First of all, they can
25 say, well, the contract has to stay in place for a

1 reasonable time. And the other version is that it's
2 terminable at will, okay.

3 And we would agree that if there is a contract,
4 it's terminable at will. And they didn't plead the
5 reasonable period option because plainly after an
6 arrangement's in place for nine years, that would be a
7 reasonable period. So they haven't alleged that.

8 So they want to argue that the contract was
9 terminable at will, we agree with that much, but that
10 it was subject to a reasonable notification period.
11 Well, we know that there's no holding of that type in
12 Rhode Island. They claim it's an issue of first
13 impression.

14 We do know that for personal services contracts,
15 those kinds of contracts can be of indefinite duration,
16 but they're terminable at will with no notice of
17 indication. If I want to fire Joe, I can fire Joe. He
18 doesn't get an automatic two weeks or four weeks or
19 whatever reasonable period is. And we know on the
20 other hand that for goods, there is -- in Rhode Island,
21 there is a termination -- there is a right to a
22 reasonable notification.

23 So which is it in this case? Well, we know that
24 the whole argument about contracts requiring a
25 reasonable notification period and being terminable at

1 will, we know that hasn't been applied by the Rhode
2 Island courts to distributorship contracts which is
3 sort of similar -- well, a distributorship is a kind of
4 services contract.

5 We know it hasn't been applied to that. We know
6 that the First Circuit has ruled that all these
7 terminable-at-will concepts don't apply outside of the
8 goods context. That's one of the First Circuit's
9 rulings in *Ross-Simons*. So they're asking the Court to
10 make this new rule which goes counter to the general
11 principle that personal services contracts are
12 terminable at will, period.

13 Now, to expand the goods rule into the situation
14 has far-reaching implications. As I said before,
15 imagine that my law firm wants to terminate its
16 accounting firm. They have been with us for nine
17 years, okay. Now, do we have to give them a reasonable
18 notification period and what is that? What about our
19 banking relationships? We've been banking the same
20 bank for years.

21 THE COURT: But those analogies are all much
22 closer to the personal services contract. What we're
23 dealing with here, and none of the cases really address
24 it, is sort of a recognition in the change in the
25 economy to much more of what happens in the economy

1 goes on over the internet. And so I think it's a close
2 question, frankly, whether transactions that occur on
3 the internet are more analogous to goods or to personal
4 services.

5 And there's at least some authority in other
6 jurisdictions that suggest that we should apply the UCC
7 model and apply the reasonable notice requirement for
8 goods. And I think we all would recognize that the
9 Rhode Island Supreme Court hasn't had the opportunity
10 to address that. But I don't think it is just a slam
11 dunk to say that the Rhode Island Supreme Court would
12 conclude this is like a personal services contract and
13 there's no reasonable notice requirement.

14 MR. PRYWES: Well, your Honor, if it's a close
15 question, then we ought to prevail.

16 THE COURT: Why?

17 MR. PRYWES: Because they're trying to take a
18 rule and apply it retroactively to a contractual
19 arrangement that was entered allegedly nine years ago.
20 I mean, your Honor, recognizing the *Pascal* decision
21 that it's very tough to retroactively take new rules of
22 law and apply them retroactively to termination
23 provisions.

24 THE COURT: Well, but the application of what
25 the law is that applies to this relationship, let's

1 just assume it's contractual for a moment, isn't frozen
2 in time to nine years ago. And even if it was, the
3 internet was a thing nine years ago. I mean, you know,
4 Amazon, eBay, Craigslist, it all was thriving nine
5 years ago, I think, and certainly more so now, but this
6 relationship, if it is an ongoing, at-will
7 relationship, I think the rules that govern it move
8 along with the law.

9 And the law has been moving in that direction.
10 I don't think you get to say, well, nine years ago we
11 thought the law was X, we thought it was personal
12 services, so therefore we don't have to give reasonable
13 notice. It's what the law said at the time your client
14 took the action, which was to terminate the contract.

15 I mean, doesn't your client have an obligation
16 to act in accordance with what the law is right then?
17 Do we have an obligation to give notice to these folks
18 that we're terminating right now, not did we have an
19 obligation to notify them nine years ago?

20 MR. PRYWES: Well, the alleged contract was
21 entered nine years ago, okay, so what were the parties'
22 expectations back nine years ago?

23 THE COURT: But if it's a personal services
24 contract, let's say that -- you know, let's say it's an
25 employment contract and you entered the employment

1 relationship in 1982, but you terminated the person in
2 1992. Well, the Americans with Disabilities Act was
3 passed in I think '89 or '91, maybe the amendments were
4 '91, maybe my years are not precise, but you don't get
5 to say that, well, when we hired this person back in
6 '82, we thought we could terminate her because of her
7 disability and we changed the law, it doesn't apply to
8 us. That's not the way it works.

9 MR. PRYWES: Well, that's a federal statute,
10 okay. We're dealing here -- and I think what the Rhode
11 Island Supreme Court has said, when you are trying to
12 take a new rule law of law and apply it to a situation,
13 a circumstance that occurred some time ago, you can't
14 apply it retroactively unless a few requirements are
15 met, one of which is that that rule of law had to be
16 clearly foreshadowed.

17 And if, as your Honor said, it's a close
18 question of law, what rule do you apply here? And that
19 means that if it was not clearly foreshadowed back in
20 2009, that the Court would supply this new term that's
21 not in the contract anywhere and, as a matter of law,
22 the Court would supply that. And we've laid that out
23 in our brief.

24 So let me also just address the implied-in-fact
25 contract claim. Basically, that claim suffers the same

1 defects, if you will, as the oral contract claim. If
2 there was not certainty as to terms and if you're
3 trying to apply a new rule of law retroactively, it
4 rises and falls with the oral contract claim. I don't
5 see it as being any different.

6 Let me address the statute-of-frauds argument.
7 If you construe the complaint as I think it's written
8 as alleging a contract for a long-term relationship,
9 that's an oral contract that's barred by the statute of
10 frauds.

11 THE COURT: But if you construe it the other
12 way, that it's terminable at will, it's not.

13 MR. PRYWES: I absolutely agree with that. All
14 I'm saying is that we have this complaint that has sort
15 of a ying and a yang to it, and we don't know what's
16 the real complaint.

17 And if the complaint is that -- if the
18 plaintiff's going to be held to the allegations that
19 there was an agreement for a long-term relationship
20 that would last for years, it has to be dismissed.

21 THE COURT: So get to the misrepresentation,
22 concealment, nondisclosure, those counts, because I
23 need to give Mr. Renner a chance and I'm on a limited
24 amount of time here.

25 MR. PRYWES: Okay. Thank you for your time,

1 your Honor. And I will get through those I think more
2 quickly.

3 THE COURT: Yes.

4 MR. PRYWES: The actual claim in the fraud
5 counts is that Hunt represented in late 2016 to early
6 2017 that it would continue the parties' relationship
7 as it had been, the historical relationship. That's in
8 paragraph 80 of the complaint.

9 Now, that -- and I touched on this before. If
10 we look at all those e-mail communications and so
11 forth, it's quite apparent that what the parties are
12 addressing there is not continuing the relationship as
13 it had been. What they're addressing is a very
14 different relationship where Hunt was potentially on
15 the hook for large amounts of money. It could
16 potentially have to pay millions of dollars if it
17 terminated the requested three-year contract early.

18 That's not what they're talking about. So the
19 whole allegation that there was some kind of fraudulent
20 promise about continuing the historical relationship
21 doesn't match those e-mails. And those e-mails are the
22 only -- and one telephone call are the only
23 communications that are alleged with particularity.

24 THE COURT: Well, the allegation -- but that's
25 not nothing. I mean, they're pretty specific. The

1 basic allegation is that, look, Hunt knew it wasn't
2 going to continue this relationship with us for a long
3 time. And they were building their own platform that
4 basically reverse engineered the platform that the
5 plaintiff had been providing for all this time.

6 And in the course of these e-mails they
7 basically strung the plaintiff along leading them to
8 believe that there was going to be some kind of written
9 contract developed to describe this ongoing
10 relationship when there actually was never an intent by
11 Hunt to do that. And the e-mails of the employee who
12 basically says, you know, with one e-mail, well, I
13 knew, I just took this over, I need a couple of months
14 to kind of, you know, get my head around this thing so
15 get back to me in April. And then they get back to her
16 in April and she says, well, you know, it's with the
17 legal department and so I need a little more time.

18 I mean, they are saying basically they knew all
19 along that they were going to drop the plaintiff and
20 they should have told them.

21 MR. PRYWES: Well, there's two principal
22 problems with that, okay. The first problem in terms
23 of this intent scienter, so forth, if you look at the
24 allegations of the complaint, paragraph 40, paragraph
25 40 alleges that as of February 2017, there was an

1 intent not to proceed. And it says presumably much
2 earlier, but there's nothing pled with particularity to
3 show that as of December 2016, January 2017, there was
4 some intent to leave the plaintiff. That's not there.

5 And we know from the *North American Catholic*
6 case and from other cases that you have to plead
7 circumstances to show -- to support an inference of
8 scienter. And there's nothing in that complaint pled
9 to support an inference of scienter as of January.

10 And then you get to February. Hunt sends them
11 an e-mail saying, hey, wait a second. We've got
12 something else cooking. We've got a larger initiative
13 under way. I mean, that should have been a red flag to
14 anybody that the brakes have been put on on any further
15 discussion of a contract.

16 Now, the second point I want to make is --

17 THE COURT: I'm not sure I'm understanding your
18 scienter argument here. There's a description going
19 from paragraph 30 forward of these -- you know, this
20 back and forth. So what is it you're -- I'm not sure I
21 understand what you're saying.

22 MR. PRYWES: Well, what I'm saying is if you
23 look at paragraph 40, it says since at least
24 February 2017, however, and presumably much earlier,
25 unbeknownst to Hunt, Hunt was developing its own online

1 document solution. It had no intention of renewing the
2 signing agreement.

3 So that's alleging that as of February 2017
4 there was an intent not to proceed with them.

5 THE COURT: Okay.

6 MR. PRYWES: It doesn't allege that in January
7 or December when some of these earlier communications
8 were made that there was an intent at that point in
9 time not to proceed in good faith with Hunt to try to
10 enter a contract. That's a huge difference because,
11 okay, in February, just a few days after they find
12 out -- just a few days in mid-February, they tell them
13 -- Hunt tells them I do realize we still need to
14 discuss this.

15 This is part of a much larger initiative in
16 setting up our standard processes. I mean, something
17 is going on there, the brakes have been put on, any
18 discussion of a further contract. So where is the
19 detrimental reliance on anything that's said in
20 February which is the crucial time period they picked
21 in the complaint?

22 THE COURT: Wait. I'm still not getting your
23 argument. Paragraph 40 says at least from February but
24 probably presumably earlier --

25 MR. PRYWES: Right.

1 THE COURT: -- Hunt was developing its own
2 online document solution and had no intention of
3 signing a contract.

4 So the way I read this is that there were these
5 exchanges prior to February which in retrospect made
6 clear that, from the plaintiff's point of view, that
7 Hunt was stringing them along.

8 MR. PRYWES: That's not what's pled.

9 THE COURT: Well, no, let me just finish. I
10 mean, so what paragraph 40 is saying is, look, there's
11 some series of exchanges that happened before February.
12 But as of February saying they clearly had developed
13 the -- they had made the decision to develop their own
14 platform and to not enter the contract, and they may
15 have made that decision even earlier.

16 MR. PRYWES: Right.

17 THE COURT: And then it goes on February through
18 April, there's a continuing stringing along.

19 MR. PRYWES: No.

20 THE COURT: Well, that's the --

21 MR. PRYWES: You know --

22 THE COURT: In April, additionally, around
23 April, Hunt knew that MHL was spending money on further
24 Hunt specific rebuilds. They didn't inform them. And
25 then in April -- I forget where it is -- there's the

1 exchange that says I know we need to continue to talk
2 about this.

3 So I'm not understanding your point that if they
4 knew in February that they were not going to continue
5 the relationship, that somehow that's not sufficient if
6 there is an obligation to disclose that and not to
7 misrepresent, not to conceal that information. Why is
8 it inadequate if it's February as opposed to December?

9 MR. PRYWES: Because in February they told them
10 there is a larger initiative under way. We're not
11 going to talk to you about a contract anymore. We have
12 to wait and see how that pans out.

13 THE COURT: Where is that in the complaint?

14 MR. PRYWES: That's in -- they quote that e-mail
15 in the complaint. It's in paragraph 35 of the
16 complaint.

17 THE COURT: The e-mail says, "I do realize we
18 need to discuss that. This is part of a much larger
19 initiative in setting up our standard processes. And
20 I'll be better informed to speak on this in 30 to 60
21 days."

22 I'm not sure what you're saying. That's not a
23 disclosure that we're setting up our own platform and
24 we're no longer going to be using you.

25 MR. PRYWES: No, but what was disclosed here

1 from day one is that no contract had been entered,
2 right? I mean, that's the allegation. The allegation
3 is that we represented we would continue the
4 relationship -- the historic relationship -- okay. The
5 historic relationship, first of all, is terminable at
6 will so it's sort of meaningless to say that we strung
7 them along because we could have terminated at any
8 time. So if you're continuing the historic
9 relationship and that's terminable at will, then where
10 is the fraud?

11 But the other point that I haven't had a chance
12 to make yet is that if you look at all those e-mails
13 from December 2016, January 2017, in each case it is
14 clear that any agreement that the parties might enter
15 is subject to a written execute agreement. In every
16 e-mail, every communication, that's what they were
17 talking about. These were preliminary negotiations
18 where everybody knew that --

19 THE COURT: I don't see why that has any bearing
20 on this. To me this is all about a simple thing which
21 is plaintiff says the defendant knew it was going to
22 set up its own platform and wanted to make a seamless
23 transition from plaintiff's platform to their own
24 platform.

25 MR. PRYWES: Right.

1 THE COURT: And they knew that if they told them
2 in the e-mail in February, if Ms. Plesh had said
3 something like we're going to set up our own platform
4 but it's not going to be ready in 60 days so there's
5 really no point in discussing this, plaintiff probably
6 would have just walked away and said, well, forget
7 about it.

8 MR. PRYWES: What they were talking about was
9 the continuing -- they were talking about a draft
10 contract, okay. That's what all the discussions were
11 about. Plaintiff has conceded that Hunt never agreed
12 to any of those draft contracts.

13 THE COURT: But that's not the point. The point
14 of those counts is not that the defendant didn't agree
15 to our draft contract. The point is that the defendant
16 knew that it wasn't going to do the contract, it wasn't
17 going to continue the relationship, it wasn't going to
18 use us anymore. That's the point. And they concealed
19 it.

20 MR. PRYWES: Well, it had no duty to tell them
21 anything other than that any contract we enter will
22 have to be executed. These were preliminary
23 discussions about a contract.

24 THE COURT: But the cause of action is for
25 misrepresentation and fraudulent concealment and so

1 forth, right?

2 MR. PRYWES: Right. But they knew all along
3 that no contract had been entered. There was no
4 concealment of that. There was no nondisclosure of
5 that. They knew that. And if you take their version
6 of what the historical relationship was, and this is
7 really important, it was terminable at will so there
8 was no stringing along. They could have terminated
9 them at any time.

10 Where is the fraud if you tell someone I'm going
11 to continue a relationship that I can terminate at any
12 time? How is that fraudulent?

13 THE COURT: It's not the termination. It's the
14 concealment. Liability for fraudulent concealment
15 arises from one party to a transaction who, by
16 concealment or other action, intentionally prevents the
17 other from acquiring material information. And that's
18 what they're alleging here, that there was material
19 information. The information is we're not going to use
20 you anymore. They knew it and they didn't tell them.

21 MR. PRYWES: Well, if there's no -- I don't have
22 to tell my accounting firm I'm not going to use you
23 anymore as long as I don't make a representation that I
24 am going to use you, okay. And they didn't make any
25 representation --

1 THE COURT: The complaint says they did.

2 MR. PRYWES: But that's why this complaint is
3 different than your run-of-the-mill complaint because
4 the only allegations that are alleged with any
5 particularity about communications are those in these
6 e-mails and in one telephone call. So your Honor has
7 before you what those communications were. And if you
8 look at them carefully, you will see that they're all
9 talking about a draft contract, they're all talking
10 conditional -- they're all conditioning any commitment
11 based on entry into an executed written agreement.

12 Now --

13 THE COURT: I need to cut you off. I need to
14 cut you off. I have to give Mr. Renner a chance here.

15 MR. PRYWES: Thank you for your time.

16 MR. RENNER: Thank you, your Honor. Big picture
17 observation, right? This is a motion to dismiss,
18 right? We're not required -- or plaintiff is not
19 required to conclusively show, you know, that it's
20 going to succeed on its claims as, you know, it seems
21 to be alleged by Hunt here. You know, I'm not going to
22 reiterate what's in the brief.

23 THE COURT: Well, you do have -- there's a
24 legitimate question raised here, whether this is a
25 contract or not. And the complaint seems to be talking

1 out of both sides of its mouth. I mean, on one hand,
2 as Mr. Prywes says, it's saying this is an oral
3 agreement for a long-term relationship that will go on
4 for many years, et cetera, et cetera, which poses a
5 couple problems, one of which is a statute-of-frauds
6 problem.

7 But out of the other side of the mouth the
8 complaint is saying it was a terminable-at-will
9 contract. So what is it?

10 MR. RENNER: Terminable at will. In paragraph
11 15, we specifically say that there is no set duration
12 for the contract.

13 You had mentioned earlier that it was
14 plaintiff's aspiration or understanding or hope that
15 the contract would be long term, that the parties would
16 continue their relationship long term, which in fact
17 they did for roughly nine years. So we specifically
18 allege, you know, hopefully clearly, perhaps not, that
19 the contract was terminable at will; there was no
20 specific duration.

21 On the statute-of-frauds argument, this idea of
22 a long-term contract, you know, taking it, you know,
23 into the statute of frauds, you know, I would point the
24 Court to the *Loan Modification* case from the First
25 Circuit which I think is, you know, pretty much on

1 point there, you know, which we discussed in our brief.
2 But basically that was a partnership -- or the
3 allegation was that there was a partnership that was
4 supposed to last for this four-year duration of the
5 federal HAMP program.

6 So the allegations in that case were that the
7 parties' intent was to carry on this partnership for
8 four years. So naturally the defendant in that case
9 said statute of frauds. Well, the First Circuit said
10 that was the hope of the parties but, you know, there
11 was nothing that was specific for four years. It was
12 just an abstract concept or a hope that it would last
13 for four years. It could have lasted for four days.

14 THE COURT: I get the argument on the statute of
15 frauds.

16 Come back to the basic issue, though, of why is
17 this a contract between these two parties?

18 MR. RENNER: The terms of the contract as, you
19 know, in the complaint, plaintiff agreed to provide its
20 services and products, it's these document centers,
21 they would create and maintain for Hunt, these online
22 document centers. In return Hunt would not give them
23 money, but would give them something else that was
24 valuable to plaintiff which were these daily move-in
25 reports. So every single day, you know, Hunt would

1 forward to plaintiff these list of customers, you know,
2 they're moving to the properties, these customers that
3 were moving into the properties, which were valuable to
4 plaintiff because plaintiff could then, you know, in
5 turn cross-sell them and earn commissions.

6 So the consideration, you know, may not have
7 been in the form of money, but it was certainly
8 consideration because it was something of value to
9 plaintiff. The terms, you know, as pled are just that
10 straight forward.

11 In return for plaintiff's provision of these
12 online document centers, Hunt forwarded the daily
13 move-in reports. And the parties continued to perform
14 under that arrangement for roughly nine years. You
15 know, that's the contract in this case, the document
16 centers contract as alleged in the complaint.

17 THE COURT: So they provide this platform.
18 People go on it. They fill in their rental
19 applications. They fill out their -- whatever other
20 forms they have to fill out to get the housing. That's
21 what happens. And then they are electronically
22 submitted through plaintiff's platform to Hunt?

23 Is that how it goes?

24 MR. RENNER: Yeah. I mean, generally speaking,
25 what happens is say some military personnel gets

1 reassigned to a base in, I don't know, Fort Worth,
2 Texas, right, so they could go on to Hunt's website,
3 find the base that's in Forth Worth, Texas. And then
4 there's a link or something -- I don't know what it
5 says exactly but, you know, apply for housing. And
6 then that link would direct this military person to
7 plaintiff's website where they would fill in all kinds
8 of information about -- you know, they could fill in
9 about pet information, information about their
10 vehicles, you know, all kinds of stuff that, you know,
11 is going to be relevant to them living on the base.

12 And then that information would in turn be
13 forwarded back, you know, provided back, you know, it
14 would be put into a manageable -- a database or
15 something for Hunt so that Hunt's property managers
16 could utilize it. So in return for plaintiff doing
17 that for Hunt, Hunt in turn, you know, gave them this
18 list of customers. And plaintiff earned money by
19 cross-selling and earning commissions, you know, from
20 cable companies, all kinds of other vendors that people
21 would -- you know, phone companies, you know.

22 So that's the contract. That's what the parties
23 performed according to those terms for roughly nine
24 years. And yet there was this discussion in 2016 and
25 into '17 about, you know, in writing, memorializing

1 their relationship. But as your Honor said, you know,
2 we're not claiming that defendants are in any way bound
3 by these draft contracts, you know, that never came to
4 fruition.

5 The contract that's the basis of our complaint
6 is the original document centers contract that the
7 parties performed according to for all those years.
8 And this -- turning to the reasonable notice issue, you
9 know, I cited, I don't know, how many, you know, well
10 over a dozen cases, treatises and the analogous UCC
11 provisions that all say the same thing. They all say
12 that in contracts calling for successive performance,
13 you know, continuing performance, which is what we have
14 here, that a contract is terminable at will upon
15 reasonable notice.

16 Now, you know, what is reasonable notice varies
17 case to case. You know, that's what a jury is for, you
18 know. Is it 30 days? 60 days? A year? You know,
19 what's reasonable? The basic requirement of reasonable
20 notice. I mean, that's universally followed, you know.
21 Maybe it hasn't arisen in Rhode Island but, as I said
22 in my brief, you know, I don't think they cited a
23 single case that says reasonable notice isn't required.

24 There were some cases from 40, 50 years ago that
25 have since been overturned and are no longer good law

1 but, I mean, you know, the rule is reasonable notice is
2 required to terminate. And that's all we're claiming
3 here, you know.

4 And personal services, you know, is this
5 analogous to a personal services contract? Well,
6 there's a good reason, public policy reason, why
7 personal services or employment contracts don't have
8 the reasonable notice requirements. Because, you know,
9 the law doesn't want, you know, servitude, doesn't want
10 an employee who doesn't want to keep working for the
11 employer, doesn't want to have them, you know, keep
12 working when they don't want to be here. Same on the
13 flip side; they don't want an employer to be forced to
14 continue to employ someone, you know.

15 But this is not a personal services contract. I
16 mean, we have two separate businesses engaged in
17 commerce, you know. For a whole host of reasons,
18 plaintiff was not an employee of Hunt. So, you know,
19 the personal services rule is just not applicable here.

20 THE COURT: Well, I mean, there are all sorts of
21 relationships that are not employment based that don't
22 require notice for termination. I mean, counsel used
23 the dry cleaning example or, you know, the mechanic of
24 my car or whatever.

25 MR. RENNER: Yeah. Well, I guess I would point

1 out that, you know, those aren't calling for successive
2 performance, you know, like we have here. Those are
3 kind of -- each is a discrete, you know, act in and of
4 itself. You know, you go to the dry cleaner one time
5 and you go another time, you know, so it's not a kind
6 of continuing relationship.

7 THE COURT: What's the difference between this
8 and, say, I don't know, Craigslist or some other online
9 platform that people use to engage in commerce?

10 MR. RENNER: Well, again, I think the difference
11 is that those are one-off contracts. They're not
12 contracts calling for successive performance, you know,
13 continuing performance like we have here where you've
14 got plaintiff investing, you know, money, time,
15 resources in, you know, building up its business based
16 on the continuing relationship.

17 The purpose of the notice requirement is when
18 there's -- you've got two businesses and they're -- you
19 know, they've come to rely on that relationship. The
20 purpose is that if one party wants to terminate which,
21 you know, again, Hunt was free to terminate plaintiff
22 at will. There's no dispute there. The only dispute
23 is what kind of notice were they required to give.

24 THE COURT: Well, let's say -- I mean, maybe an
25 analogy is advertising. Say I hire an advertising firm

1 and I say, look, I want you to develop a website for me
2 that effectively represents the company and develops
3 some social media approaches, you know, develop a
4 Twitter account, develop a Facebook account, you know,
5 tweet things out for us and so forth. And the company
6 does that and it's an ongoing relationship. They've
7 got some back and forth happening. You know, we've got
8 this new product. Would you send something out on
9 that. Would you generate some interest. And then one
10 day they decide to use a different company for that.

11 Do you think they have to give reasonable
12 notice?

13 MR. RENNER: Yeah. To the extent that the
14 advertising agency isn't acting as an agent on behalf
15 of. You know, this personal services applies to
16 employment contracts and agency contracts so to the
17 extent that the advertising company isn't acting as an
18 agent of the business and thus a personal services
19 contract then, yes, I would submit that the law says
20 that they have to give reasonable notice.

21 Now, again, what is reasonable notice? That's
22 for a jury. You know, it could be a week, it could be
23 30 days. But when you have continuing successive
24 performances, you know, the law says that if you want
25 to terminate, which is your right, you need in good

1 faith to give reasonable notice.

2 THE COURT: Let's assume that reasonable notice
3 is a month. So what are your damages?

4 MR. RENNER: The lost profit during that
5 reasonable notice period.

6 THE COURT: So a month's lost profit? What
7 could that be? That can't be that much.

8 MR. RENNER: You know, it varies case to case.
9 In that situation it might not be that much. But in
10 this case, it could be, you know, six months, nine
11 months, you know. There's case law, you know, there's
12 plenty of cases, you know, where courts have found or
13 juries have found, you know, reasonable notice for many
14 months, if not years.

15 THE COURT: How could it be that in a
16 relationship like this you would need to give a year's
17 notice? I mean, I can't imagine any jury would find
18 that.

19 MR. RENNER: Well, the courts -- what it's based
20 on, you know, loosely speaking, is the amount of time
21 that it would take to replace or seek a substitute
22 arrangement. You know, in this case, I would submit
23 that the reasonable notice period should be measured by
24 the amount of time that it would take plaintiff to find
25 a replacement or a substitute arrangement for Hunt.

1 THE COURT: Why should it be measured that way?

2 MR. RENNER: That's just what the court said.

3 THE COURT: Your client is providing a service.
4 Use my analogy of a company that's providing
5 advertising or social media. I mean, that doesn't
6 sound like that's the way the law should work that, you
7 know, you have to give us enough notice to allow us
8 time to replace you as a customer and if it takes us a
9 year?

10 MR. RENNER: That's just the way the restatement
11 works -- excuse me, the UCC works. It says that, you
12 know, the measure of the notice period is the amount of
13 time it would take to seek a substitute arrangement,
14 you know. Other factors might play a role, you know,
15 the length of the relationship between the parties, the
16 importance of one party to the other, you know.

17 So it's all measured, it's on a case-by-case
18 basis. So what might be reasonable in one case, you
19 know, it could be more or less in another case. That's
20 just the way it is. And again, that's a question
21 for -- what is reasonable notice is for the jury to
22 decide. That's a question of fact.

23 THE COURT: Okay. We might be getting ahead of
24 ourselves on that one.

25 MR. RENNER: So I could move on briefly to the

1 fraud counts. You know, your Honor described the
2 theory of our fraud claims pretty well. It's this
3 string-along fraud that Hunt knew for many months that,
4 you know, it was intending and it was going to
5 discontinue the relationship and all the while it made
6 representations and omissions which is, you know, just
7 as important here, the failure to disclose, that it was
8 going to terminate the relationship in order to keep
9 the plaintiff working until it could, you know, build
10 its own solution. That's the nature of the claim.

11 This whole idea about, you know, what the
12 e-mails say or what plaintiff should or shouldn't have
13 known or should have gleaned or what should have been
14 obvious, you know, that's all well and good and Hunt is
15 free to advance, you know, that theory of its case
16 going forward. But on a motion to dismiss, you know,
17 it's just not proper for it to basically put its own
18 spins and introduce its own facts, you know.

19 Nowhere do any of those e-mails say that, you
20 know, the relationship continuing is subject to this or
21 that or conditioned on this or that or that much less
22 that we may or intended to terminate, you know. That's
23 just not anywhere in those e-mails. It's not anywhere
24 in the complaint. In fact, it's the opposite. The
25 complaint specifically says that Hunt never even

1 suggested that it didn't intend to continue the
2 relationship or that it didn't intend to sign a
3 contract, you know.

4 THE COURT: Okay. All right. I think I've
5 heard enough, Mr. Renner. Thank you.

6 MR. RENNER: Thank you.

7 THE COURT: All right. I'm going to rule from
8 the bench. I think that the complaint has stated
9 sufficiently causes of action that are alleged in order
10 to survive a motion to dismiss. I'm going to deny the
11 motion to dismiss in full. I'll put my reasons in a
12 very short written order that will follow in a few
13 weeks, but I don't think there's any need for a long
14 elaboration of the reasons for denying, although I will
15 give you enough so that you can understand my
16 rationale.

17 What do you need for discovery in this case, do
18 you think?

19 MR. RENNER: E-mails from Hunt, you know,
20 internal --

21 THE COURT: I mean, how much time?

22 MR. RENNER: Oh, time? I mean, I would think
23 for fact discovery six months should suffice and maybe
24 two months for expert discovery.

25 THE COURT: What experts?

1 MR. RENNER: Damages expert and possibly an
2 industry standard expert who could testify as to what
3 the reasonable notice, you know, would have been in the
4 industry.

5 THE COURT: All right. Do you agree with that?

6 MR. PRYWES: I'd push it out maybe. I think
7 eight months would be a little more reasonable.

8 THE COURT: Well, I think if we include the
9 experts, you'll be up to that amount of time. So
10 here's what I'm going to do. I'll give you six months
11 for fact discovery and then plaintiff expert
12 disclosures 30 days following that. Defendants' expert
13 disclosures within 30 days after that. And then expert
14 depositions will follow 30 days. And then either
15 pretrial memos or motions for summary judgment to be
16 filed within 30 days after the discovery closure
17 deadline.

18 Then there is a dispositive motion. The
19 pretrial memos will be due 30 days after a decision on
20 the dispositive motion. So all of this will be reduced
21 to a text order or a pretrial order with the specific
22 dates in there.

23 Now, having said all that, we'll get the
24 discovery rolling in this case. I think you all should
25 have a settlement conference I think on the early side

1 rather than waiting too long because, Mr. Renner,
2 unless you can come up with something that is pretty
3 strong here in terms of what you think the industry
4 practice is about reasonable notice and that it's some
5 lengthy period of time, the way I look at this case,
6 sort of at the end of the day, the damages are defined
7 by whatever the loss profits are for, assuming you
8 could get by summary judgment on all these issues,
9 which is an assumption, a significant assumption. But
10 your damages are defined by that period of time between
11 when the notice was given of the termination and when
12 it should have been given under a reasonable notice
13 theory, right?

14 MR. RENNER: Well, for the breach-of-contract
15 claim, yes. But I look at the fraud claim separately,
16 you know. That's when did they have a duty to
17 disclose?

18 THE COURT: Why is it different?

19 MR. RENNER: Well, because in addition to lost
20 profits, the fraud claim -- and again, this is probably
21 going to be the subject of an expert report, but in
22 addition to the lost profits for plaintiff, plaintiff
23 provided services, you know. So another measure of its
24 damages would include the value of the services
25 provided during the time that, you know, it was relying

1 on Hunt's representation.

2 THE COURT: What does that mean, the value of
3 the services provided? I don't understand that.

4 MR. RENNER: Well, it could mean, you know, on a
5 free fair-market value of the services, you know, how
6 much it would have charged. Again, it didn't charge
7 anything to Hunt to provide these services. So one
8 measure might be the fair-market value.

9 THE COURT: But that was your contract; you just
10 described it. The contract was that we give you a
11 platform and you give us these reports. That's the
12 contract.

13 MR. RENNER: That was the contract.

14 THE COURT: So there is no claim for value
15 beyond that if that's what you think your contract is.
16 Your client makes money through these various
17 commissions that occur because of that. You know, if
18 they should have given you 30 days or 60 days or 90
19 days, whatever was lost during that period, if you can
20 find a way to prove that, and there might be historical
21 reference that proves whatever that is, you know,
22 that's the measure of your client's damages.

23 But, you know, the idea that there's an
24 obligation to give us five years' notice or ten years'
25 notice, I just don't see that. So what I'm getting at

1 is before you all go out and just, you know, run up a
2 lot of legal fees in this case, I think you ought to
3 have a settlement conference to see if this thing could
4 be worked out. So I'm going to encourage you to do
5 that on the early side. I do think probably some
6 initial disclosures and some preliminary discovery
7 would make sense so that you can get a, you know, real
8 precise understanding of what it is that's being
9 claimed and what the claims are on the defense side.

10 So I'm going to ask Judge Sullivan to reach out
11 to you in about two to three months, depending on her
12 schedule, to see if she can get you in for a settlement
13 conference, all right.

14 Okay. All right. Thank you very much. We'll
15 be in recess.

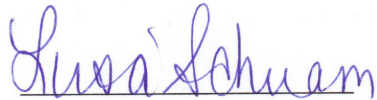
16 COURTROOM DEPUTY: All rise.

17 (Time noted: 11:17 a.m.)
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CERTIFICATION

I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.



Official Court Reporter

July 25, 2018

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